STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

LALE ROBERTS and JOAN ROBERTS,

Plaintiffs-Appellees,

vs.

KATHRYN SALMI, L.P.C., an individual, d/b/a SALMI CHRISTIAN COUNSELING,

Defendant-Appellant.

/

Supreme Court No.: 150919

Court of Appeals No.: 316068

Houghton County Circuit Court
Case No.: 12-15075-NH

REPLY BRIEF FOR DEFENDANT-APPELLANT
KATHRYN SALMI, L.P.C., D/B/A SALMI CHRISTIAN COUNSELING

*****ORAL ARGUMENT REQUESTED*****

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ARGUMENT

A MENTAL HEALTH PROFESSIONAL DOES NOT HAVE A DUTY OF CARE TO THIRD PARTIES WHO FORESEEABLY MIGHT BE HARMED BY THE MENTAL HEALTH PROFESSIONAL'S USE OF TECHNIQUES THAT CAUSE A PATIENT TO HAVE FALSE MEMORIES OF SEXUAL ABUSE.

The Court of Appeals erred in extending the duty of care owed by a mental health professional to non-patient third parties.

A. Ms. Salmi Owed No Common Law Duty To The Non-Patient Plaintiffs.

While plaintiffs focus on the foreseeability of harm, simple foreseeability of harm does not establish a duty on the part of a therapist to the parent of a patient. As recognized by the courts that have rejected this and similar causes of action, it is entirely foreseeable that a diagnosis that a patient was abused by a parent is going to cause that parent harm. See e.g. *Trear v Sills*, 69 Cal App 4th 1341, 1346-1348, 1356 (Cal, 1999); *Bird v WCW*, 868 SW2d 767, 769 (Tex, 1994). But the duty analysis cannot end there. Rather, a number of considerations relevant to the duty analysis must be considered, including the placement of competing demands on therapists to their patients and to third parties who could be foreseeably harmed, as well as the duty of confidentiality owed by every therapist to their patients, both of which strongly militate against imposition of a duty here.

The courts in the case law cited by plaintiffs that have recognized a duty to the parents of a patient, invariably have failed to address the conflicts of interest that the imposition of a duty to a possible abuser creates. In rejecting the extension of the therapist's duty to third parties in the recovered memory context, the California Court of Appeals in *Trear v Sills, supra* held:

> The very inexactitude of the therapeutic enterprise puts the good faith therapist in an untenable position if a duty is imposed upon him or her toward the patient's possible abuser. It would subject the therapist to inherently conflicting incentives, to the detriment of the patient. The *patient* would be denied the benefit of the nonquantifiable aspects of the therapist's diagnosis: the "feel" that is conveyed by personal contact (as all trial lawyers who work with juries can appreciate), the

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> gray subjective sense of the person that is part of the therapist's professional training, and the discretionary and judgment calls involved in determining whether a given patient really was abused. A duty to a potential abuser affords the therapist no "leeway" in deciding whether the patient really was abused: It would put the therapist in the position of a jury called upon to make a determination according to well-established and predetermined rules of evidence, rather than as a "helping" professional – except that, unlike judges and juries, the therapist would face personal liability if the determination were wrong. Either way. [*Trear*, *supra*, 69 Cal App 4th at 1351-1352 (emphasis in original)].

As further held by the Court in *Trear*, the factors of foreseeability and certainty of the harm do not favor imposition of liability because of the inherent problem of verifiability of the claims, holding that it would be "manifestly unfair to predicate liability on the idea that the therapist can foresee the virtually certain harm to the accused *parent* when the harm to the *patient* from *failing* to diagnose childhood sexual abuse as the cause of the patient's ills is just as foreseeable." *Trear* at 1355 (emphasis in original).

The case examples cited by plaintiffs where Michigan courts have recognized a duty to a third party (title abstractor to those who foreseeably relied on the accuracy of the abstract of title; accountant to those who foreseeably relied on the accuracy of the accountant's reports; architects to those lawfully on the premises; attorneys to intended beneficiaries of will or trust) (plaintiffs' brief on appeal, pp 22-23) are easily distinguishable on the basis of the significance of the privacy and privilege interests here at issue. A person's financial or proprietary interests are very different from a person's mental health and mental health treatment (the privacy of which is enshrined in statute).

B. The Only Duty Owed By A Mental Health Professional To Warn Or Protect A Non-Patient Third Party Under Michigan Law Is That Established By MCL 330.1946.

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Plaintiffs' assertion that MCL 330.1946 cannot be viewed as preempting plaintiffs' common law claim based on the Supreme Court's decision in *Dawe v Dr Reuven Bar-Levav & Assocs, PC*, 485 Mich 20; 780 NW2d 272 (2010), is misguided. First, as noted above and in

defendant's brief on appeal, plaintiffs, as non-patients, do not have a common law claim based on alleged negligence or malpractice in the care of their daughter. *Swan v Wedgwood Christian Youth & Family Services, Inc*, 230 Mich App 190; 583 NW2d 719 (1998). Likewise, the duty of disclosure of patient information to a non-patient, as asserted by plaintiffs, has no basis in the common law and would violate the counselor-client privilege.

This Court in *Dawe, supra*, did not address, and did not purport to alter Michigan common law regarding the rights of third party non-patients. The issue in *Dawe* was entirely different then that here, in that the Court addressed only the question of whether MCL 330.1946 eliminated a common law medical malpractice claim by the patient, not a claim by a non-patient third party. As this Court stated, and resolved, this issue before it:

> In this case we must decide whether a **plaintiff-patient** may pursue a **common-law medical malpractice claim** against his or **her mental health professional** when the mental health professional allegedly negligently placed the plaintiff in danger of harm at the hands of another patient or whether the Mental Health Code, in MCL 330.1946, abrogated such a common-law claim. We hold that MCL 330.1946 did not abrogate a **plaintiff-patient's common-law medical malpractice claim** when the mental health professional's **separate duty arising out of his or her special relationship with the patient** would apply and no "threat as described in [MCL 330.1946(1)]" was communicated to the mental health professional. MCL 330.1946(1). Therefore, we reverse the judgment of the Court of Appeals. [*Dawe, supra*, 485 Mich at 22].

It is clear that *Dawe* did not in any way involve the issue here—the alleged breach of a duty to provide information about the treatment of a patient to a third party or to treat a patient in a certain way for the benefit of a third party (complaint, ¶ 27, Apx 36a). Therefore, *Dawe* has no application here, where the plaintiffs are third parties, and assert not a common law medical malpractice action, but a claim based on a mental health professional's failure to provide information about, or properly treat, a patient, which is not recognized at common law, *Swan, supra*, and/or is not directly within the scope and limitations of MCL 330.1946. As such, the

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Court of Appeals improperly created a separate "limited" duty owed by mental health professionals to third parties.

C. The Existence Of The Statutory Duty Of Confidentiality Owed By The Counselor To The Client, And The Client's Concomitant Right To Confidentiality, Also Weighs Against Extending The Duty Of Care To Non-Patient Third Parties.

Plaintiffs rely upon the Wisconsin Supreme Court's decision in *Johnson v Rogers Memorial Hospital, Inc*, 283 Wis 2d 384; 700 NW2d 27 (Wis 2005) for the proposition that the Court of Appeals correctly extended the duty owed by Ms. Salmi to the plaintiff-parents and created a "public policy exemption" to the counselor-client privilege in cases involving claims of negligent therapy that results in allegedly false memories of sexual abuse (plaintiffs' brief on appeal, pp 18-22, 27-28). Given this State's strict adherence to the privilege afforded treatment, and in particular mental health treatment, neither a duty nor an "exemption" to the privilege should be created or recognized here. This is particularly true where such an "exemption" as created in *Johnson* would result in compelled disclosure of patient records over the patient's objection.

Simply because plaintiffs cannot pursue a cause of action absent access to "K's" mental health records does not support the conclusion that a duty and subsequent involuntary waiver of the privilege should be found here. While defendant acknowledges that the inability to access or use patient records themselves will impair the parties' ability to prove or disprove allegations made by plaintiffs in support of their negligence claim, such difficulty repeatedly has been rejected as a basis upon which the statutory privileges may be judicially abrogated in favor of either defendants or plaintiffs. See *Baker v Oakwood Hospital Corp*, 239 Mich App 461, 463; 608 NW2d 823 (2000) (holding that patient information was not discoverable by a plaintiff former employee from a defendant health care provider/employer, even in redacted form, in a

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wrongful discharge/public policy tort action even though the medical records of Alzheimer's patients contained information necessary to plaintiff's lawsuit against her former employers, a physician and hospital; "defendants' alleged motive in asserting the privilege is inconsequential"); *Dierickx v Cottage Hospital Corp*, 152 Mich App 162; 393 NW2d 564 (1986) (precluding a defendant health care provider in a medical malpractice action from access to nonparty patient records relevant to the defendant's defense and specifically rejecting defendant's argument that "the privilege was not absolute where it was asserted solely to gain strategic advantage and to conceal evidence likely to establish the truth"); *Meier v Awaad*, 299 Mich App 655; 832 NW2d 251 (2013) (in the context of addressing a litigation discovery issue involving the privacy rights of nonparty patients, the Court held that trial court's ruling allowing plaintiffs access to the names and addresses of all Medicaid beneficiaries who were treated by defendant and coded as having been diagnosed with epilepsy or seizure disorder in order to allow the determination of putative class members and witnesses violated Michigan's statutory physician-patient privilege, MCL 600.2157).

See also *Schechet v Kesten*, 372 Mich 346, 351; 136 NW2d 718 (1964) (holding that the physician-patient privilege prohibits the physician from disclosing, in the course of any action wherein his patient or patients are not involved and do not consent, even the names of such noninvolved patients); *Briggs v Briggs*, 20 Mich 34, 41 (1870) (holding that the prior version of the physician-patient privilege statute forbidding a physician to disclose any information which he might have acquired while attending any patient in his professional character, and which information was necessary to prescribe for such patient or act for him, did not confine the information acquired by communications made by the patient to the physician, but protected whatever was disclosed in order to enable the physician to prescribe and which in any way was

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brought to his knowledge for that purpose); *Steiner v Bonanni,* 292 Mich App 265, 274; 807 NW2d 902 (2011) (recognizing that there are only limited exceptions to Michigan's general nondisclosure requirements and there is no Michigan rule for nonconsensual disclosure of nonparty patient information in judicial proceedings); *Dorris v Detroit Osteopathic Hospital Corp*, 460 Mich 26; 594 NW2d 455 (1999) (holding, in the consolidated *Gregory* case, that a hospital cannot be compelled to reveal the name of a nonparty patient who allegedly assaulted the plaintiff, even for purposes of identifying a potential defendant in a medical malpractice/tort action, where the patient has neither voluntarily nor impliedly waived the privilege, based upon "strong public policy reasons"; "[t]he concept of privilege . . . supersedes even the liberal discovery principles of this state").

There are no appellate decisions, nor any statutory or regulatory provisions, that would permit discovery or the admission of evidence in derogation of the statutory counselor-client privilege in a civil tort action. Rather, the plain language of the counselor-client privilege statute, MCL 333.18117, as well as the holdings in above-cited cases, highlight the strong protections afforded nonparty patient information in this state, which weigh against the finding of a duty here. Michigan law precludes discovery or admissibility of the records to which plaintiffs seek access. The patient records of "K" are confidential and disclosure should not be compelled, particularly over the patient's objection.

Plaintiffs argue extensively throughout their brief that "K" either has not asserted the privilege or has "waived" the counselor-client privilege "by her actions," by relaying her allegations of abuse during a joint therapy session in July 2009 (plaintiffs' brief on appeal, pp 26-27); through "interviews with DHS workers and several MSP Troopers" (*Id.*, pp 17-18); by expressing to the prosecutor her willingness to testify against her father in a criminal action (*Id.*,

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p 18); by discussing the abuse and/or her counseling with siblings, members of her church congregation, a bible camp, and the adults with whom she currently resides (*Id.*, p 18); by indicating on a petition to change her name that she had issues with her family (*Id.*, p 18); by the mere fact that plaintiffs, as "K's" parents, know that Ms. Salmi treated their daughter (*Id.*, pp 26-27); and/or because she was deposed by her parents' attorney in a separate action brought by her parents (*Id.*, p 18).

To the extent that plaintiffs are correct in their assertion that there has been no assertion of privilege and/or there has been a waiver of the privilege, defendant submits that this is irrelevant because the question of duty cannot depend on whether there is a waiver in any particular case. For all the reasons set forth above and in their brief on appeal, defendant submits that there is no duty owed to third parties regardless of whether there is a waiver of the privilege by the patient.

In any event, defendant submits that none of these instances of purported "conduct" by "K" would result in an express waiver of the counselor-client privilege for purposes of this action by "K," as required in *People v Stanaway*, 446 Mich 643, 684; 521 NW2d 557 (1994) (holding that the Legislature expressly provided that in the case of psychologists and psychiatrists, the privilege must be expressly waived by the privilege holder). "K's" non-waiver of the counselor-client privilege is an insurmountable problem for plaintiffs' continued pursuit of this cause of action.

Not only have plaintiffs failed to cite to any law establishing that these purported "acts" by "K" would constitute an express waiver of the counselor-client privilege, but any holding that an express waiver can be found under any of the circumstances advocated by plaintiffs would constitute bad public policy. "K's" discussion of abuse or therapy with family, friends,

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prosecutors or investigators should not result in a waiver of the privilege for purposes of a cause of action to which she is not even a party. To hold otherwise would deter a patient from discussing her care and treatment with trusted family members and friends for fear of waiving the privilege. Nor should these family members or friends be put in a position where they would have to betray the confidences of "K" by answering at deposition whether or not "K" discussed the abuse or her therapy with them.

Similarly, the fact that "K's" deposition was taken in a separate action should not constitute an express waiver of the privilege for purposes of this cause of action, to which she is not a party. To hold otherwise would only encourage litigants and their attorneys to seek to obtain the privileged information of the non-party using any means necessary – such as is endorsed by plaintiffs here and was attempted by plaintiffs' attorney in taking the deposition of "K" in the context of a separate, unrelated action. As set forth in defendant's brief on appeal, this Court should not sanction the systematic harassment of "K" and/or her friends and other family members by plaintiffs or plaintiffs' counsel under the pretext of conducting "discovery" in an action in which "K" is not a party.

Finally, given the holding in *Stanaway*, it is clear that a person's disclosure of allegations of sexual assault to a prosecutor or investigator does not constitute an express waiver of the privilege. If this were true, there would have been no need for the Court in *Stanaway* to have created a judicial exception to the therapist-client privilege applicable to a victim in a criminal case, because the privilege would have been already waived by the mere fact that the victim spoke with the investigator and prosecutor. Moreover, it would be bad public policy to hold that a patient/victim waives the counselor-client privilege in a subsequent civil action to which she is not a party by discussing her care and treatment with a prosecutor or investigator. To hold

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otherwise would only serve to discourage victims of sexual abuse from speaking with investigators and prosecutors for fear of waiving the privilege.

D. That "K" Was A Minor At The Time She Started Treatment With Ms. Salmi, That Plaintiffs Paid For Counseling Sessions, Or That Plaintiffs Participated In A Group Counseling Session, Does Not Create A Duty Owed To Plaintiffs Arising Out Of The Allegedly Negligent Diagnosis And Treatment Of Their Child.

The mere fact that "K" was a minor at the time she started treatment with Ms. Salmi, that plaintiffs paid for counseling sessions, or that plaintiffs participated in a group counseling session, does not create a duty owed to plaintiffs arising out of the allegedly negligent diagnosis and treatment of their (now adult) child.

Given the case law set forth in defendant's brief on appeal, there is no basis to create the existence of a duty owed to third-party plaintiffs based upon either "K's" minority status at the time she began treatment with Ms. Salmi or who provided payment for the counseling sessions (plaintiffs' brief on appeal, pp 2, 7-8, 27). Again, in the context of allegations of physical or sexual abuse perpetrated on a minor, the loyalty of the therapist lies only with the patient and not third parties; particularly third parties who are the alleged perpetrators of the abuse. To hold otherwise compromises the integrity of the counselor-client relationship and is fundamentally inconsistent with the therapist's obligation to the patient. Moreover, the duty of confidentiality applies to the patient regardless of either the child's age or the identity of the person who pays the bill for services rendered.

Moreover, plaintiffs focus heavily on the "special relationship" between plaintiffs and Ms. Salmi on the basis that they were also patients of Ms. Salmi and attended a group counseling session (plaintiffs' brief on appeal, pp 8-11, 24, 26-27, 35). Merely because plaintiffs were involved in a group counseling session wherein they were confronted with the allegations of

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abuse[1] does not create a duty owed to plaintiffs arising out of the allegedly negligent diagnosis and treatment of their child. Plaintiffs are not asserting a claim based on negligent treatment provided by Ms. Salmi to them as her patients, which resulted in harm. Rather, plaintiffs' claim is that Ms. Salmi negligently treated their daughter, which resulted in harm to them due to their daughter's subsequent allegations of abuse. Therefore, there is no basis for imposition of a duty under these circumstances, even based upon the "special relationship" they had with Ms. Salmi "because they were patients themselves" (plaintiffs' brief on appeal, pp 11, 26).

RELIEF REQUESTED

WHEREFORE defendant respectfully requests that this Honorable Court reverse the Court of Appeals' decision and reinstate the trial court's grant of summary disposition.

Respectfully submitted,

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Dated: January 27, 2016

[1] Plaintiffs asserted in their response to the application that they sought leave from the trial court to amend their complaint to allege that Ms. Salmi herself, not "K," confronted plaintiffs with "K's" allegations of abuse (plaintiffs' response to application, p 2). On appeal, plaintiffs assert that is was Ms. Salmi who confronted the plaintiffs with the allegations (plaintiffs' brief on appeal, p 24). Defendant submits that, regardless of which factual situation is pled, this is a distinction without a difference and does not create a duty owed by Ms. Salmi to the plaintiffs.

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Defendant-Appellant.

/

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CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2016, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following: Zachary C. Kemp, Esq. (zach@thekemplawfirm.com).

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